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No. 09-1521

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

EASTERN SHAWNEE TRIBE OF OKLAHOMA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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The Federal Circuit in this case rejected the government's argument that 28 U.S.C. 1500 operates to deprive the Court of Federal Claims (CFC) of jurisdiction over the claims asserted by Eastern Shawnee Tribe (Tribe) because the Tribe has filed a related suit in district court that, *inter alia*, arises out of substantially the same operative facts. The court of appeals found its decision in *Tohono O'odham Nation* v. *United States*, 559 F.3d 1284 (2009) cert. granted, No. 09-846 (Apr. 19, 2010) (*Tohono*), to be controlling on the question presented. The court thus held that it was "bound by the carlier decision in *Tohono*" and, "[f]or the same reasons described in *Tohono*, § 1500 does not bar the Court of Federal Claims here from exercising jurisdiction over the Tribe's claims." Pet. App. 10a; see *id.* at 2a; Pet. 5-7.

The Tribe does not deny that this Court's forthcoming decision in *Tohono* will be highly relevant to the proper disposition in this case. It instead argues (at 1-3, 15-18) that the Federal Circuit's decision in *Tohono*—which builds upon *Casman* v. *United States*, 135 Ct. Cl. 647 (1956), and *Loveladies Harbor, Inc.* v. *United States*, 27 F.3d 1545, 1549, 1551 (1994) (en banc)—is correct and that Section 1500 does not apply where a plaintiff's CFC and its district court lawsuit seek "different relief." That contention does not provide a sound basis for denying certiorari. This Court will soon decide in *Tohono* whether the Federal Circuit's interpretation of Section 1500 is correct. Oral argument in *Tohono* is currently scheduled for November 1, 2010. Because the Federal Circuit simply applied its own decision in *Tohono* to this case, this Court should hold the petition in this case pending its own decision in *Tohono* and then dispose of the petition as appropriate.[1]

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[1] The Tribe's suggestion (at 18-20) that the government requests a "stay" of proceedings in this Court appears to misunderstand the nature of the government's request to hold the petition pending the Court's disposition in *Tohono*. The government has not asked this Court to stay the proceedings below.

The CFC in this case stayed its own proceedings pending the resolution of this petition. The Tribe's suggestion (at 19) that it did not understand the potential duration of that stay is meritless. The government's petition specifically suggests that this Court hold the petition pending its decision in *Tohono*. Pet. 7-8. The Tribe was served with that petition on June 15, 2010, and it waived its response. On July 20, 2010, the parties requested that the CFC stay its own proceedings, explaining in their joint motion that the government's petition specifically "requested that the decision on that petition be held pending the Supreme Court's decision in *Tohono*" and that the Tribe had waived its right to file a response. Joint Mot. 1 (filed July 20, 2010). The CFC and the Tribe were thus fully aware of the petition's request well before the CFC stayed its proceedings on September 2, 2010.

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For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be held pending the Court's decision in *United States* v. *Tohono O'odham Nation*, No. 09-846, and then disposed of accordingly.

Respectfully submitted.

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